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Supreme Court of the United States

OCTOBER TERM, 1941.

No. 36.

J. E. PIERCE, PETITIONER,

VS.

UNITED STATES OF AMERICA.

ASSIGNMENT OF ERROR, BRIEF AND ARGUMENT FOR PETITIONER.

L. E. GWINN,
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OPINION BELOW.

The opinion of the Circuit Court of Appeals for the Sixth Circuit (R. 347-350) is reported in 115 F. 2d 399.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered November 15, 1940.

Petition for rehearing, filed December 10, 1940, was denied February 4, 1941.

Petition for certiorari to review the judgment of the Circuit Court of Appeals was duly filed in this Court, being case No. 833, October Term, 1940, and granted on April 14, 1941.

The jurisdiction of this court was invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and the writ of certiorari having been granted thereunder, the case is before this court for determination by it with the same power and authority, and with like effect, as if brought here by unrestricted writ of error or appeal. See also Rule XI of the Rules of Practice and Procedure in Criminal Cases promulgated by this court May 7, 1934.

STATEMENT OF THE CASE.

J. E. Pierce, petitioner herein, and E. H. Roach were convicted for alleged violations of Section 32 of the Criminal Code (18 U. S. C. A., Sec. 76), prohibiting the impersonation of officers or employees of the United States. The judgment of conviction was reversed (86 F. 2d 949).

On a second trial, Roach was acquitted and the jury disagreed as to petitioner.

The third trial resulted in the conviction of petitioner on fifteen counts of the indictment. Cumulative prison sentences, aggregating eight years, and fines, totaling $3,500, were imposed (R. 13, 14).

The Circuit Court of Appeals affirmed the judgment of conviction.

(a)

General Preliminary Statement.

Petitioner was editor of the Huntsville (Alabama) Daily Register. His prosecution arose out of an advertising campaign, conducted by him in behalf of that paper,

this campaign beginning prior to the passage of the Tennessee Valley Authority Act of 1933 (R. 137, 140).

The indictment charged that petitioner pretended to be a representative of the Government, selling "T. V. A. Units" and the Government sought to prove that he represented himself to be an officer of the Government or a *representative of the T. V. A. engaged in the sale of "T. V. A. Units."*

It was the contention of petitioner that he was engaged in an advertising campaign, soliciting funds for community advertising, and that he did not claim to have any connection whatever with either the Government or the Tennessee Valley Authority.

Funds were solicited for page advertisements of counties, and the advertising campaign had been under way for more than two years (R. 139) when petitioner was arrested in Gibson County, Tennessee, on a state charge. This arrest was made at the instance of a small group of citizens whose demand for a refund of money paid petitioner had been refused (R. 169). It resulted in the federal prosecution.

In the canvass of 17 counties in North Alabama, 46 counties in Mississippi, and 11 counties in Tennessee, that preceded the arrest of petitioner in Gibson County, Tennessee, several thousand subscriptions had been obtained and thousands of copies of the paper, containing the page advertisements, had been mailed to sponsors in the territory canvassed, including the mailing of hundreds of copies to citizens of counties contiguous to Gibson (R. 139-154).

Funds were solicited and obtained not only from individuals, including bankers, lawyers, doctors, merchants, but also from colleges, governing authorities of municipalities, including a town in a county adjoining Gibson, and from Chambers of Commerce (R. 196).

Every check, and payments were usually made by check, whether written by petitioner or by the subscriber, was made payable to the Huntsville Daily Register or bearer and showed in its face that it was given for "advertising" (R. 37, 208, 165, 73).

In every instance where petitioner obtained funds, whether in cash or by check, a receipt on the printed bill head of the Huntsville Daily Register was then and there given the person making the payment. This receipt, showing the purpose for which the funds were paid and received, was written in the presence of the contributor and was signed by petitioner as editor of the paper (R. 46, 51, 53, 60, 66, 69, 70, 75, 85, 100, 104, 109, 130, 132).

To illustrate the plan, and show the character of work done in other counties copies of the Huntsville Daily Register, containing page advertisements of counties, bound together in a bundle called the "dummy," were exhibited to every prospect, and in connection with this demonstration the advantages of community organization, co-operation and publicity in securing "lower taxes, better roads and cheaper power" were emphasized by petitioner (R. 40, 49, 63, 67, 77, 88, 98, 105, 124).

To comprehend this plan required the prospect to listen and to observe, and it is the contention of petitioner that the failure of some of the Government witnesses either to observe or to listen with due care explains the impression or conclusion, apparently formed in a few instances, that petitioner was acting in an official capacity —a conclusion in direct conflict with that formed by the overwhelming majority of the persons who heard the plan presented in a sales talk of such uniformity that it was designated as a "canned sales talk" by persons who heard it more than once (R. 259, 260).

As to the expression "T. V. A. Units," Roach thus testified.

"The first time I ever heard the expression 'T. V. A. Units' was after we were arrested in Gibson County. Such an expression was never used by Mr. Pierce in my presence in the presentation of his plan. He did not speak of 'units of advertising'—was divided into 250 units—the plan called for the public underwriting $1,400 and the newspaper underwriting $1,000" (R. 263).

To the same effect was the testimony of disinterested witnesses who in the aggregate heard hundreds of presentations of the plan (R. 206, 207, 218, 222, 230, 237, 251).

(b)

Statute Involved.

The indictment charged violation of Section 32 of the Criminal Code (U. S. C. A., Tit. 18, Sec. 76). This statute was amended on February 28, 1938, the amendment being made after the reversal of this case and subsequent to all transactions involved in the indictment. The statute, with the amendment of February 28, 1938, shown in bold type, is as follows:

"Whoever, with intent to defraud either the United States or any person, shall falsely assume or pretend to be an officer or employee acting under the authority of the United States, or any department, or any officer of the Government thereof, **or under the authority of any corporation owned** or **controlled by the United States,** and shall take upon himself to act as such, or shall in such pretended character demand or obtain from any person or from the United States, or any department thereof, or any officer of the Government thereof, **or any corporation owned or controlled by the United States,** any money, paper document, or other valuable thing, shall be fined not more than $1,000 or imprisoned not more than three years, or both."

(c)

The Indictment.

Eight of the counts on which convictions were had charged the offense created by the first provision of Section 32 of the Criminal Code and seven of the counts alleged the commission of the offense denounced by the second provision of that statute.

In each count of the indictment, it was charged that petitioner, J. E. Pierce, and E. E. Roach, with intent to defraud, did "falsely assume and pretend to be officers of the United States, to-wit, representatives of the Government selling T. V. A. Units," but no facts were recited to support the conclusion of the pleader.

Motion to quash and demurrer to the indictment, duly made, were overruled, but the Circuit Court of Appeals, while reversing the first judgment of conviction, held that the indictment sufficiently charged the two offenses denounced by the statute (86 F. 2d 949). Counsel for petitioner, acting on the assumption that this ruling established the law of the case in so far as it related to the new trial in the District Court, did not renew the demurrer and motion to quash but did point out the insufficiency of the indictment in the motion for a directed verdict (R. 291-292).

(d)

Questions Presented.

(1) Whether there is any substantial evidence that petitioner in any transaction, made the basis of a count in the indictment, falsely impersonated an "officer or employee acting under the authority of the United States, or any department, or any officer of the Government thereof," this question being duly raised by motion for a directed verdict, made at the conclusion of the evidence for the Government and renewed at the conclusion of all

the evidence, exception being taken to the action of the Court in overruling this motion (Tr. 293).

(2) Whether the Court erred in refusing, over the objection and exception of petitioner, a special request duly tendered by the defendant and relating to a material matter not included in the Court's general charge, this request being as follows, to-wit:

> "At the request of the def ndant, the Court further instructs the Jury that the Tennessee Valley Authority, commonly designated as T. V. A., although an instrumentality of the Federal Government, is a corporate entity, separate and distinct from the Federal Government itself, and the officers and employees of that corporation are not within the scope of the statute on which the indictment in this case is based. Consequently, any claim or representation by the defendant, if you find that such claim or representation was made, that he was representing the T. V. A., or was connected with the T. V. A. as an officer or employee, would not constitute the false impersonation of an officer or employee of the United States Government or any department thereof, within the meaning of the Statute which the defendant is alleged to have violated in the several counts of the indictment" (R. 308).

(3) Whether a mere verbal declaration of a connection with, or representation of, the Federal Government that is not accompanied by any act in keeping with the pretense constitutes an offense under Section 32 of the Criminal Code. Or, otherwise stated, where no badge or insignia of office is displayed, does not the completion of the offense require the performance or attempted performance of an actual or colorable official act?

(4) Whether an indictment which charges in general terms that the accused did falsely pretend to be "officers of the United States, to-wit, repre ntatives of the Government selling T. V. A. units * * * and take upon

themselves to act as such" is sufficiently descriptive of any actual or apparent official act to charge the offense denounced by either clause of Section 32 of the Criminal Code.

(e)

Holdings of Court of Appeals.

At the first trial, the court was not asked to instruct the jury as to the distinction, if any, between an impersonation of officers or employees of the Tennessee Valley Authority and those of the Government, but motion was made to quash the indictment and also to direct a verdict in favor of the defendants on the ground that the T. V. A. was a corporate entity distinct from the Government.

In his opinion, reversing the case, Judge Simon held that the indictment did not charge that petitioner and his co-defendant represented themselves to be "agents or employees of the Tennessee Valley Authority" but charged that they "assumed or pretended to be representatives of the Government" (86 F. 2d 951).

But notwithstanding the above holding, the Government at the subsequent trials developed its case on the theory that the T. V. A. was an "arm of the Government" (R. 316), and, as will later be shown, Government witnesses made no distinction between the Government and the Tennessee Valley Authority.

In that situation, petitioner asked the trial court to instruct the jury directly and explicitly that the "Tennessee Valley Authority, commonly designated as the T. V. A., although an instrumentality of Government, is a corporate entity separate and distinct from the Government itself, and the officers and employees of that corporation are not within the scope of the statute on which the indictment in this case is based" (R. 308).

But the instruction thus requested was refused (R. 308).

Speaking of that refusal, Judge Arant, in his opinion affirming the case, said:

> "Appellant claims that the testimony of government witnesses could be construed to mean that appellant represented himself to be an officer or employee of the Tennessee Valley Authority and insists that the general charge will be examined in vain for the semblance of a suggestion that officers or employees of the Tennessee Valley Authority were not within the purview of the statute. So vital a matter, he contends, should have been called to the attention of the jury in an explicit instruction.
>
> "We disagree. The charge was explicit, and the conviction was supported by evidence that the appellant held himself out not as an officer or employee of the Tennessee Valley Authority, but as 'acting under the authority of the United States Government,' which is quite a different thing and clearly within the condemnation of the statute" (Opinion, 115 F. 2d 401; R. 347).

To sustain petitioner's contention, not controverted by the opinion, that there is not a tinge nor a color of either statement or suggestion in the general charge that the T. V. A. was a corporate entity, separate and distinct from the Government, reference is made to the charge (R. 294-308).

To show that the Government witnesses, regarding the Tennessee Valley Authority as identical with the Government, made no distinction in their testimony between that corporation and the Government, and also that most if not all of the Government proof, if accepted at its face value, showed a claimed connection with, or representation of, the T. V. A., and nothing more, we recite the Government testimony under each count of the indictment as to the claimed representations made by petitioner.

(f)

The Government Testimony.

With the exception of Count II, two counts, one under the first and the other under the second clause of Section 32 of the Criminal Code, were based on each of the several transactions in the indictment, a single witness testifying to the transaction in each count or pair of counts, as follows:

Count II. "He (Pierce) approached me and claimed he was selling TVA units * * * I wouldn't be positive about the Government" (R. 52, 55, 56) is the testimony of the Government witness Witt in regard to the transaction in Count II. It appears without dispute that this same witness at a preliminary hearing two days after the transaction testified that he did not remember petitioner saying anything about the Government (R. 288).

Counts IV and V: "We represent TVA, Muscle Shoals power and sell TVA units of $10 a unit * * * We put up dollar for dollar each dollar the people put up" is the language attributed to Pierce by the Government witness Utley (R. 59) who alone of all the witnesses claimed to be able to repeat the language used by petitioner.

Counts IX and X: "We are here representing the Government, trying to sell TVA units," is the language attributed to Pierce by the Government witness Clarence Lucky. This witness also testified that he did not look at the receipt, given him by petitioner, till he got home, that he paid little or no attention to the use of newspapers in demonstrating the plan, and that he was stating his "understanding without any ability to recall the exact language that was used" (R. 110-112).

Counts XI and XII: "He (Pierce) * * * told me that he was representing the Government selling TVA" are the words attributed to Pierce by the witness Simpson.

This witness further testified that petitioner did not claim to be an "officer of the United States Government" but said that he was "working in the interest of the Government promoting cheaper power" (R. 78). At the preliminary hearing, as appears without question in the record, this witness thus testified:

> "They (petitioner and Roach) said they was in here working in the interest of the TVA" (R. 78, 79).

Counts XIV and XV: "He (Pierce) told me a bit about TVA and wanted to sell me some units and I didn't feel able to buy them and he told me that they would match dollar for dollar—

Q. Who would match dollar for dollar?
A. The Government, and I bought two units in TVA"

is the testimony of Frank Blackman regarding the transaction in Counts XIV and XV (R. 66). This witness, at the preliminary hearing, testified that Pierce said he was "working in the interest of Muscle Shoals project" (R. 70, 288). On cross examination at the trial herein he testified that Pierce did not say the "Government" would match contributions, that he actually said "We will match dollar for dollar," which the witness construed as a reference to the Government because petitioner said he was "selling TVA units and Muscle Shoals power" (R. 71).

Counts XVI and XVII: "He (Pierce) said I am representing TVA in their project to get to the rural communities in the TVA territory" is the language of the witness Conyers (R. 120). At the former trial, this witness testified thus: "* * * he (Pierce) told me it was all in *furtherance of this TVA program the Government was so interested in*" (R. 128).

Counts XVIII and XIX: "He (Pierce) said he was representing TVA and wanted to sell me units in the TVA" is the language attributed to Pierce by the Government witness Robinson. Robinson further testified

that when he asked Pierce if the $20 subscription the witness made would result in his getting cheaper lights, petitioner responded, "No, it is for advertising" (R. 88). Robinson at the first trial did not use the word "government" in detailing the statement made to him by Pierce, but in his testimony at the second trial added that word to the statement he attributed to petitioner. At the third trial, he thus explained the addition of the word "government," saying: "The reason I put in the Government was that he (Pierce) was selling TVA and I knew that was a Government project" (R. 316, 317).

Counts XX and XXI: "He (Pierce) told me the purpose he was there for—there in the interest of the Government, selling the people of Crockett County TVA units or stock" (R. 91), is the statement attributed to Pierce by the Government witness Cherry. At the second trial undertaking to detail this statement, the witness made no mention of the word "Government" but said: "He (Pierce) said he was there to sell some TVA units or stock to us farmers of Crockett County and other counties and insisted on me taking $100 worth of units—stock in TVA" (R. 330).

(g)

The Facts.

The uncontroverted evidence shows:

(1) That petitioner, a newspaper man with more than forty years' experience (R. 135), was editor of the Huntsville (Alabama) Daily Register, a paper with a small circulation, published in the Muscle Shoals territory, and Vice President of the corporation that published the paper (R. 135).

(2) That prior to the passage of the Tennessee Valley Authority Act of 1933, this paper began a campaign in which funds were solicited for page advertisements of

counties or groups of counties (R. 137, 140), and petitioner, having been long identified with civic enterprises, including road improvements and power development in rural communities, was designated to conduct that campaign (R. 137, 138). As early as 1921, petitioner's activity in behalf of better roads and the "development of North Alabama through the use of Muscle Shoals power" had won high praise from newspapers in that territory (R. 137). At the time of the trial herein he was Vice President and a member of the Advisory Council of the United States Good Roads Association (R. 138).

(3) The campaign had been under way, and with marked success, for more than two years when the transactions involved in the indictment were had in Gibson and Crockett Counties, Tennessee. This prior canvass had covered 17 counties in North Alabama, 46 counties in Mississippi, and 11 counties in western Tennessee (R. 139, 140, 141).

(4) The plan involved the raising of $1,400 to pay the cost of the page advertisement of the county or group of counties to which it was devoted. The advertisement set forth the natural and potential resources of the county, contained the names of the sponsors, and in small spaces used for that purpose advertised any property they had for sale. This page advertisement was published in twenty different but not consecutive issues of the paper. In so far as it was an advertisement of the county, it was rewritten for each publication, but no change was made in that part of the advertisement devoted to the sponsors (R. 143). These advertisements were prepared and published in accordance with the agreements of petitioner (R. 145, 149).

(5) At regular rates, the series of page advertisements of a county or group of counties would have cost $2,400. As a basis on which to solicit funds, this cost

was divided into 240 units of $10 each, and it was stated to the prospective contributors that petitioner or his paper would take care of $1,000 of the $2,400, and publish the advertisement if the county would raise $1,400 (R. 144), this being solicited on the basis of $10 a unit. No subscription for less than ten dollars was accepted (R. 151).

(6) The only credential or evidence of authority presented by the petitioner in his talks to Government witnesses, or anyone else, was a letter of identification and information, *written on the stationery of the Huntsville Daily Register, stating the objects and purposes of the work being done by the petitioner Pierce*, and read to the persons from whom funds were sought or obtained (R. 139, 227, 236, 261, 262). This letter, omitting the heading, is as follows:

"Huntsville, Alabama
April 21, 1934

"To Whom It May Concern:

"This will introduce J. E. Pierce, Editor and Vice-President of the Huntsville Daily Register, Huntsville, Alabama.

"As a matter of information and identification, Mr. Pierce is 53-years of age, 6 ft. tall, weighs 196-lbs. on the average, prematurely gray, wears glasses, carries cane, and while presenting pleasing personality and stately appearance, he is modest and of a retiring disposition.

"Mr. Pierce erected one 12-story office building in Huntsville, he is one of the Directors of the magnificent 12-story hotel here, one of the owners of a 7-story bank building, a substantial farmer, is a Deacon in the First Baptist Church and is actively identified in Chamber of Commerce and civic work generally.

"We have assigned Mr. Pierce to the task of completing the Muscle Shoals series of page newspaper advertisements (20-in number) for each group of one

or more counties from the Georgia line to the Mississippi River.

"In this work, Mr. Pierce is authorized to transact any and all business pertaining to the interest of this company, including the endorsement of checks, drafts and other items made payable to order or otherwise in favor of this company. Banks, bankers and or trust company or companies, as well as individuals, are requested to so recognize his authority as Vice-President and or Editor of the Huntsville Daily Register.

"Any courtesies you may extend Mr. Pierce in the fine public work in which he is engaged will be appreciated on the part of the company, and thanking you, we are

Respectfully yours,

The Huntsville Daily Register,
The Register Publishing Company,
By 'Wm. H. Pierce' (Signed)
President"

(R. 35, 36.)

(7) In all transactions involved in the indictment and in every instance in which money was paid to Pierce, he then and there, as a part of the transaction, gave to the party making the payment a receipt showing the purpose for which it was paid and the capacity in which it was received. This receipt was on the printed bill head or statement of the Huntsville Daily Register. It was written in the presence of the subscriber or the contributor and signed by Pierce as Editor of the paper (R. 37, 46, 48, 49, 51, 53, 54, 60, 66, 69, 70, 74, 75, 85, 93, 100, 104, 109, 122, 130, 132).

Some of the witnesses testified that this receipt, written in their presence, was folded by petitioner when he handed it to the witness; others testified that it was open. As to the folding thereof we quote from the testimony of one of the Government witnesses as follows:

"Q. I wasn't asking you what you bought; I was asking you if you had any difficulty in understanding, when you examined the receipt, what you had paid your money for?

A. No, sir; not after I read the receipt, I didn't.

Q. And that receipt was given you at the time you gave him the check?

A. Yes, sir.

Q. All there as a part of the same transaction?

A. That is right.

Q. And even though it was folded, unfolding it just took an instant of time; didn't it?

A. That is right; yes, sir" (R. 104).

(8) In a majority of cases payment was made by check and in every instance this check, whether written by the subscriber or by petitioner, was made payable to the "Huntsville Daily Register or Bearer" and showed on its face that it was given for *"advertising"* (R. 28, 66, 73, 74, 92, 103, 109, 128, 129).

(9) To illustrate the plan and show the prospect the character of work done in other counties copies of the Huntsville Daily Register, carrying page advertisements of counties previously canvassed, were exhibited by petitioner to every Government witness testifying to a transaction involved in the indictment and to all the other witnesses, and all the witnesses admitted that such a demonstration was made in their presence by petitioner and the witness Roach as a part of the transaction in which funds were solicited (R. 25, 27, 34, 47, 51, 57, 63, 68, 75, 86, 97, 105, 110, 124, 126, 132).

(10) The verdict under each count rests on the recollection of a single witness who heard the presentation of the plan but once, and the record discloses no instance where any person who heard more than one presentation thereof formed an impression or conclusion that petitioner was acting in a federal official capacity. On the contrary,

the record affirmatively shows that all persons who heard more than one presentation of the plan clearly understood that petitioner was soliciting funds for community advertising, and also that the response to its general presentation without the slightest claim or pretense of federal authority was such that from fifty to eighty per cent of the persons solicited made subscriptions (R. 206, 216, 218, 222, 227, 252).

(11) No Government witness, testifying to a transaction involved in the indictment, who formed the impression or conclusion that petitioner was connected with the Government claimed that he was able to repeat the exact language that was spoken with respect to the Government (R. 51, 69, 70, 77, 78, 86, 97, 110, 112, 123). As to other matters such as the reading of the letter of identification ovservation of what was written on checks they signed or on receipts given to them and the exhibitions of the newspapers in demonstrating the plan, the testimony of these witnesses is a chorus of "I did not notice," "I paid no particular attention," and like statements (R. 40, 47, 57, 78, 105, 110, 111, 112, 126, 128). None of them claimed to have made any specific inquiry of petitioner as to the character of his office or employment nor to have asked or been told by petitioner what a "T. V. A. unit" was. The record does disclose however, that petitioner was occasionally asked if he represented the Government but also that when such a question was asked he promptly and positively stated that he was not connected with the Government in any capacity (R. 167, 210, 230, 242, 257).

(12) The distribution of the papers, containing the page advertisements prepared by petitioner, was not restricted to the regular circulation of the papers that carried the advertisements but copies thereof were sent to members of Congress, Governors, Chambers of Commerce and Advertising Bureaus, etc., throughout the country

(R. 156, 157). Among favorable comments made on the character of these advertisements was a letter from Senator Capper of Kansas (R. 156); a resolution by the Arkansas State Legislature (R. 160), and the statement by a national organization of advertising experts, located in Chicago, that one of the "booster pages" for Gibson county was the "outstanding" advertisement of its class in June, 1935, that was discovered by that group after an examination of more than a thousand newspapers during that month (R. 148). These advertisements, like the sales talks, stressed the importance of community organization, co-operation and publicity to secure tax reduction, road improvement and power development, and petitioner testified that he believed that his program would aid in the accomplishment of these objectives (R. 202, 264).

With respect to the above mentioned "booster page," for Gibson County, published in June, 1935, we quote from its commendation by Harris C. Bennett, Director, Best Ideas Service of the Advertising Checking Bureau, Inc., Chicago, as follows:

> "Congratulations are in order, and the presentation of this kind of valuable publicity or advertising is in a class by itself. We know of no other newspaper rendering this service, but other papers might reasonably be interested in emulating same" (R. 148).

And this is the resolution adopted by the Arkansas Legislature:

> "Whereas, there has been placed on our desks a copy of a special edition of the Sheridan Headlight, edited and published by Representative Dalton V. Walker, and
>
> "Whereas, this edition contains much favorable publicity advertising the natural and potential resources of the State Of Arkansas, and
>
> "Whereas, this special edition has been distributed to the President of the United States, every

United States Senator, every Representative, every Governor in the United States and Chamber of Commerce of the United States, and

"Whereas, the State is receiving much favorable publicity and comment,

"Therefore, be it resolved that the House of Representatives of the 52nd General Assembly, commend Mr. Walker on his efforts in publishing this splendid edition, which has done much to advertise the State of Arkansas. Adopted February 15, 1939" (R. 159, 160).

And this is the certificate of the Editor of the Sheridan Headlight, showing petitioner's connection with the edition of the paper referred to in the foregoing resolution:

"This certifies that J. E. Pierce, Publicity Director of the Pierce Newspaper Publishers' Service, Huntsville, Alabama, has successfully completed a 20-page 10,000 copy special edition for us under date of February 2, 1939. The effort was a success in every way, so much so that the Arkansas Legislature adopted resolutions commending it, and letters of endorsement were received from United States Senators, Representatives, Governors of States and other sources" (R. 159).

(13) Throughout the campaign petitioner sought to arouse public sentiment and promote community organization for cheaper power, lower taxes and better roads (R. 186, 187-191). As to his own intent and belief that his campaign would aid in bringing about these objectives, defendant thus testified:

"Q. Mr. Pierce, I will ask you this question. From your experience as a newspaper man and from your experience in specialized advertising, state whether or not there is any yardstick by which you can definitely determine the value in dollars and cents of publicity advertising?

A. No, sir, advertising of that character has an intangible value. It can't be seen or felt except as

the results accrue after the publicity is over. As a merchant will advertise his wares, a community will do likewise.

Q. Mr. Pierce, in the presentation of your plan under which you state you solicited funds for advertising these various counties, state whether or not it was your belief that this campaign would have any bearing one way or another on the development of better roads and cheaper power?

A. Yes, sir. I was so saturated with the idea and believed in it so conclusively that I devoted practically my whole life to such campaigns, both editorially and in the sale of specialized advertising campaigns" (R. 202).

(14) The procedure followed and the things done by petitioner in presenting his advertising plan to persons from whom funds were solicited are thus stated by the witness Roach:

"There were but few of the sales talks made by Mr. Pierce in this canvass I did not hear. Mr. Pierce carried with him a letter of identification, stating who he was and with whom he was connected, and a post card folder of buildings in and around Huntsville. The letter shown me (Government Ex. ....), is either the original or a duplicate of that letter.

"When we entered a county, the usual procedure was to get someone familiar with the county to go with us, this being done to save time, and to get over the roads, so as to get to substantial people who were able to help promote a project of that kind. Mr. Pierce would show his letter of identification and go through his program. In making the canvass of Mississippi, we usually had county agents, but not in every instance. I was well acquainted in that state and traveled in it all my life.

"In practically all counties, we had a county agent. Usually we would contact the sheriff of the county and try to obtain the services of a deputy or former deputy sheriff on account of their familiarity with

the county and its people. These agents had an opportunity to hear the sales talks that were made. In many instances they did, sometimes they did not. The sales talk as made by Mr. Pierce from the time I commenced to work for him in August, 1934, until June, 1935, when we were arrested in Gibson County, was substantially uniform. It was practically a 'canned sales talk,' the difference being the reference to a man's business or profession, whether he was banker, farmer, lawyer or doctor.

"We called on the classes mentioned, including professors in universities. The University of the South at Sewanee was sold $100 of this publicity.

"In the presentation of his plan in Mississippi and in Tennessee, Mr. Pierce did not claim at any time I was present to be an officer or agent of the Federal Government, nor did he claim to have any official connection with either the Government or the TVA, but solicited funds, and so stated to the prospects, for advertising the natural and potential resources of the county; advocating cheaper power, lower taxes and better roads. Had he claimed to be a Government man or a representative of the Government or of TVA in my presence I would have quit automatically, because I did not believe that he was and he never made any such statement or representation in my presence.

"In our canvass of Gibson County, we first contacted the Sheriff, Mr. Robert Jones, and he recommended Mr. Ross to us. In Crockett County, we contacted Sheriff Montague, and I understand that he is dead.

"The post card folder, to which I have referred, is Government exhibit ..... . That folder, copies of the Huntsville Daily Register, and the letter of identification, were all the literature we had in the canvass of West Tennessee counties, including Gib-

son and Crockett. We did not have nor exhibit any maps. I did not share in the profits of sales, and had no interest except the compensation I received.

"Since the reversal of the conviction in the first trial of Mr. Pierce and myself, or beginning about three months thereafter, I have been employed by Mr. Pierce, assisting him in a canvass of Arkansas counties substantially the same as that conducted in Tennessee.

"Mr. Pierce no longer publishes the Huntsville Daily Register, but makes a connection with some local newspaper and advertises the natural and potential resources of the county, advocating cheaper power, lower taxes, better roads, and adequate drainage, this latter being added after we entered the State of Arkansas" (R. 259, 260).

SPECIFICATION OF ERRORS.

1. The Circuit Court of Appeals erred in overruling petitioner's second assignment of error in that Court (R. 332), complaining of the action of the trial court in overruling petitioner's motion for a directed verdict. Such motion, made at the conclusion of all the evidence, objection and exception being duly taken to the action of the trial court in overruling same, incorporated in the assignment of error referred to, reads as follows:

> "First, there is no evidence to support a verdict;
>
> "Second, The evidence, when considered as a whole, is as consistent with the innocence as with the guilt of the defendant; and, therefore, does not warrant submission of the case to the Jury;
>
> "Third, as to the counts based on the first provision of Sec. 32, Tit. 18, U. S. C., Sec. 76 of the Criminal Code, and which makes it an offense for any person with intent to defraud, falsely to assume or pretend to be an Officer or Employee acting under the authority of the United States or any Department or any officer of the Government thereof and who shall take upon himself as such.
>
> "There is neither allegation in the indictment, nor evidence of any act on the part of the defendant, Pierce, as an Officer, or Employee of the Federal Government, and no evidence that the defendant, Pierce officiated, or attempted to officiate as an officer or employee acting under the authority of the United States, or any Department or any officer of the Government thereof;
>
> "Fourth, as to counts based on the second division of said Section 32 of the Criminal Code (18 U. S. C., Sec. 76) which makes it an offense for any person, with intent to defraud to demand or obtain any money, papers, documents, or other valuable things" while acting in a purported Federal Official character. There

is neither allegation in these counts of the indictment, nor evidence that the defendant, J. E. Pierce, demanded or obtained anything of value by reason of false personation of an employee, or officer of the United States Government, or any department or officer thereof;

"Fifth, The Tennessee Valley Authority, while an instrumentality of the Government, is a corporate entity, separate and distinct from the Government, so that employees thereof are not Officers or employees of the Federal Government or any Department thereof, so as to come within the purview of Section 32 of the Criminal Code; and consequently, any claim that the defendant, Pierce, was connected with the TVA or representing the TVA would not constitute a false personation under Section 32 of the Criminal Code;

"Sixth, The undisputed evidence shows that in each and every transaction complained of in any count of the indictment the person from whom funds were obtained was given a receipt therefor, this showing that the money was received, not in a Federal Official character, but as Publisher of a newspaper, and even though the evidence should be susceptible of the interpretation that the defendant claimed to be selling TVA Units, such a representation, in the face of the fact that each person named in any count of the indictment had at hand the means of detecting the falsity, would not constitute a false pretense within, the meaning of the Federal Statute;

"Seventh, There is no evidence of any overt act which is an essential element of both of the offenses denounced by Section 32 of the Criminal Code, and the mere representation, or claiming to be an Official, a Federal Official, would not constitute a violation of that Statute."

2. The Circuit Court of Appeals erred in overruling petitioner's fourth assignment of error in that Court (R. 334), complaining of the action of the trial court in refusing to grant petitioner's special request, incorporated

in that assignment, in which the court was asked to instruct the jury that the Tennessee Valley Authority, commonly designated as the TVA, was a corporate entity, separate and distinct from the Government, so that the employees thereof were not within the purview of Section 32 of the Criminal Code, such request having been duly tendered and exception taken to the refusal of the trial judge to grant the same, all of which appears at page 308 of the record. (Reference is here made to Question 2, *ante*, where the special request herein referred to is set out in full.)

3. The Circuit Court of Appeals erred in failing and refusing to hold that a mere verbal declaration of a connection with, or representation of, the Federal Government, unaccompanied by the display of any badge or insignia of office, or any act in keeping with the pretense, does not constitute a violation of Section 32 of the Criminal Code, and particularly in refusing to sustain the 6th ground of petitioner's motion for a directed verdict, this ground reciting that there was no evidence of an overt act that is an essential element of both offenses denounced by Section 32 of the Criminal Code (R. 333).

4. The Circuit Court of Appeals erred in holding on the first appeal that the several counts of the indictment adequately charged a violation of Section 32 of the Criminal Code and on the second appeal in sustaining the action of the trial court in overruling the 3rd and 4th grounds of petitioner's motion for a directed verdict, these being based in part on the claimed insufficiency of the indictment (R. 332, 333).

(While believing that the indictment does not sufficiently state a violation of Section 32 of the Criminal Code, that question is so interwoven with the sufficiency of the evidence to support a verdict that petitioner, having brought it to the attention of the Court, will not further discuss the validity of the indictment.)

ARGUMENT.

We state and shall argue:

I. Petitioner's Motion for a directed verdict should have been sustained.

II. The refusal of petitioner's special request was a denial of due process of law.

III. A mere verbal declaration of a general or undefined federal agency or employment unaccompanied by any apparent or colorable official act does not constitute the false personation that is an essential element of both offenses denounced by section 32 of the federal criminal code.

I.

THE MOTION FOR A DIRECTED VERDICT SHOULD HAVE BEEN SUSTAINED.

In support of the foregoing contention, we state and argue:

(1) There is no substantial evidence that petitioner claimed to be an officer or employee of the Federal Government, or any department thereof selling "T. V. A. Units."

(2) Such a claim, if made to the indictment witnesses, falls within the operation of the rule that there is no false pretense where the representation is "absurd or irrational or where the party alleged to be defrauded had the means of detection at hand."

(1)

In the opinion, the Court of Appeals states that a "witness who with positiveness could recount all the details surrounding an event that had occurred four years previously would be either a genius or unworthy of belief. 3 Wigmore on Evidence (3rd Ed., 1940), Sec. 726" (pp. 2-3).

An application of the sound principle thus stated, together with another principle, recognized by the same distinguished author, would seem to preclude any holding that there was substantial evidence to support the conviction under any count. We refer to the principle of "*completeness*" (Wigmore, 3rd Ed., Secs. 729, 2099), that should be applied both to "recollection" and "observation" of a transaction involving both words and acts.

In attempting to narrate the words and acts of petitioner no witness other than Utley, who had obviously memorized his testimony at the former trial (R. 59, 62), claimed to be able to state the substance of the things said and done by petitioner, considered as a whole, in presenting his plan. Utley's testimony does not establish any violation of the statute.

The impression which petitioner intended to convey to any witness should be determined "not by individual words or phrases alone, but by the whole impression or effect of what has been said or done" (Wigmore, 3rd Ed., Sec. 1040).

" 'Substance' though not reproducing the precise words, should at least represent the tenor of the utterance as a whole, and not mere fragments of it" (Wigmore, Sec. 2099).

If tested by the foregoing principles, which we regard as sound and fair, the testimony of the government does not present a substantial conflict with the positive testimony of petitioner and his witnesses. The case should

therefore be controlled by the rule pronounced by the Supreme Court in *Gunning* v. *Cooley*, 281 U. S. 90, which rejects the scintilla rule and holds that where the evidence on one side is so overwhelming as to leave no room to doubt what the fact is, the case should not be submitted to the jury.

Bearing in mind that an understanding of the plan presented by petitioner required the prospect to exercise both his faculties of *hearing* and *observation*, that almost without exception government witnesses, testifying to transactions involved in the indictment, testified that they paid little or no attention to the newspaper demonstration, made by appellant to every prospect as a part of the presentation of the plan, or to the exhibition or reading of letters to them (R. 40, 47, 57, 78, 105, 110, 111, 112, 126, 128), it seems quite clear that such testimony does not meet the test of "completeness" that should be applied in determining its probative force.

Further discussing the evidence, we state certain propositions, supported by the record, which we think conclusively show that peremptory instructions to return a verdict of not guilty should have been given to the jury.

(a)

The General Features of the Sales Talks Made by Petitioner in the Solicitation of Funds Were Practically the Same. This Uniformity Being Established by the Testimony of Both Witnesses for the Government and the Defendant.

The testimony is in substantial accord as to the things done. These include:

(1) The reading in whole or in part of a letter, identifying Pierce as the representative of a newspaper, carrying out a program of advertising; (2) the exhibition of a post card folder, showing among other things buildings in which he was interested, this further identifying him with private enterprise; (3) the demonstration of

the plan with copies of the Huntsville Daily Register, showing the character of advertisements given counties previously canvassed; (4) the taking of checks payable to this newspaper or bearer; (5) and the issuance of a receipt *written in the presence of the contributor, on the printed bill head of the Huntsville Daily Register*, this receipt showing the purpose for which the money was paid (R. 25, 34, 40, 49, 53, 54, 63, 67, 69, 70, 75, 77, 85, 87, 88, 98, 100, 110, 105, 106, 163, 206, 215, 217, 223, 227, 228, 236, 250, 260, 261).

In some instances, Goverrment witnesses, testifying to transactions involved in the indictment, do not admit the reading of the letter of identification (Ex. 2, R. 35) to them but state that they could not recall whether or not petitioner read this letter to them (R. 58, 78, 87, 101). One of these indictment witnesses, who could not recall whether or not this letter was read to him, testified that petitioner's representations were "something like statements in that letter" (R. 78).

All of the indictment witnesses, however, admitted that copies of the Huntsville Daily Register were exhibited to them in the demonstration of the plan, that petitioner discussed advertising with them, and most of them also admitted that they understood the paper was to be sent to them for a stated period of time (R. 54, 58, 67, 71, 75, 76, 85, 87, 93, 101, 111, 125, 130, 131).

In but one instance was there any misunderstanding as to the character of the newspaper exhibited by petitioner. The government witness Conyers, the transaction with that witness being involved in Counts 16 and 17, testified that he consented for petitioner to advertise his land (R. 131) but that he thought the Huntsville Daily Register, copies of which were exhibited to him, was a TVA publication and not a personally owned paper, stating, however, that he reached this conclusion without making any inquiry of petitioner about the own-

ership or publication of the paper used in the demonstration (R. 126). Conyers seems to have been the only person among the hundreds to whom the demonstration was made who drew the conclusion that the Huntsville Daily Register was a TVA publication.

A comparison of the testimony of the Government witness Witt, testifying to the transaction involved in Count 2, and that of State Senator C. E. Garner, a banker and farmer of Gibson County, who testified in behalf of petitioner, establishes that the sales talk, so uniform that some of the witnesses referred to it as a "canned sales talk" (R. 259, 260), to these two witnesses was substantially the same, though they drew different conclusions therefrom.

Witt testified that petitioner stressed the importance of cheaper power, better roads and lower taxes to rural communities, and claimed that he was "trying to promote community organization and advertising along that line" (R. 57).

Garner, who contributed $50, testified that he thought his "contribution might help to promote and bring about quicker the rural development of TVA" (R. 245), but that petitioner did not claim to be "acting for the Government or any of its agencies," and that he, the witness, understood that he "was contributing to an advertisement in the Huntsville Daily Register," so doing because he was "interested in hastening the extension of cheaper power to Gibson County" (R. 249).

Both Witt and Garner contributed with the same object in view—hastening the extension of cheaper power into their respective communities. Each acted on substantially the same representations. One confused a publicity advertising campaign by a newspaper promoting the objectives stated with an officially sponsored program of the Government or the TVA with respect to one of these objectives, the extension of cheaper power. The

other did not. *The difference was not in the representations that were made but in the understanding of the witnesses.*

But Witt's misunderstanding of the plan was not disclosed to petitioner. Neither he nor any other indictment witness asked petitioner if he was connected with the Government and only one of them made specific inquiry as to the purpose for which his contribution would be used, and he was told that it was for "advertising" (R. 88).

(b)

It Is Indisputably Established by the Record That Pierce in the General Course of the Extensive Campaign Conducted by Him Was Able to Sell and Did Sell His Plan to an Overwhelming Majority of the Several Thousand Persons from Whom He Solicited Subscriptions Without the Slightest Pretense of Federal Authority and That Any Confusion of His Publicity Advertising with an Officially Sponsored T. V. A. or Government Program Only Occurred in Exceptional Cases and Then Without the Knowledge or Design of Pierce.

The testimony of various persons who accompanied petitioner and Roach in the campaign for the solicitation of funds, and who stand unimpeached in the record, clearly sustain the above proposition. These witnesses are: Walter Brock (R. 206) and Dewey Claunch (R. 257), who accompanied defendant in the canvass of Mississippi counties immediately preceding the campaign in West Tennessee; R. E. Ross (R. 215), Ernest N. Drake (R. 217), Artie B. Dancer (R. 222), W. A. Penner (R. 226), J. H. Caughlin (R. 235), Ernest Caldwell (R. 235), J. H. Caughlin (R. 235), and E. C. Harrell (R. 250), who accompanied petitioner and Roach in the canvass of West Tennessee counties.

These ten witnesses accompanied petitioner for various intervals of time, ranging from three days to three months, and in the aggregate heard not less than a thousand (probably more) of the sales talks as made to all classes of persons and under conditions identical with

those existing in Gibson and Crockett Counties, but not one of them ever heard the expression "TVA units" until the arrest of defendant in the present case; and each testified that petitioner was engaged in a campaign in which funds were solicited for newspaper advertising and that the plan was presented without any claim or pretense of Federal authority or official connection with the Tennessee Valley Authority.

There are two uncontroverted facts in connection with the general course of the business as conducted by Pierce which are destructive of the Government's theory of a general scheme to defraud the public through a false pretense of Federal authority. One of these is equally destructive of any theory that such was done in exceptional cases.

First: Petitioner as a rule was accompanied in his canvass of a county by some local resident of good character and standing, who was familiar with the roads of the county, and usually selected on recommendation of the Sheriff, or the Chamber of Commerce if such existed in the county. This party did not participate in the campaign further than to show the roads of the county and aid in locating the residences of persons on whom Pierce planned to call. But he either heard or had the opportunity to hear what was said in presenting the plan, and too often to be mistaken as to the nature of the plan. If Pierce was engaged in the execution of a plan to swindle the public it is inherently improbable that he would have followed the course pursued with respect to the employment of residents of the counties canvassed who would be available as witnesses to prove the representations that were made.

Second: Pierce, in every instance where money was received by him, gave the contributor a receipt written in his presence, showing the exact purpose for which the

money was paid. If petitioner had obtained funds as a Federal Officer, a reading of the receipt meant immediate discovery and probably exposure of the fraud, and while Pierce was still engaged in a canvass of the county. Is this the course of a clever swindler, executing a scheme to defraud? Would any man with intelligence above that of a plain idiot perpetrate a dangerous fraud and as a part of the fraudulent transaction serve a written notice thereof on the victim of the fraud?

But that is what Pierce did if he obtained money in the pretended character of a Federal official for a T. V. A. program and at the same time executed a receipt showing that the money was paid to a newspaper for subscription and advertising. It is said, however, that the receipts were folded. What of it? Did that afford any substantial protection? How long did it take to unfold one of these receipts?

The answers to these questions may be found in the testimony of the Government witness, M. R. Lewis, speaking with reference to the receipt given him by the defendant this witness testified:

"Q. And you had no difficulty in understanding it was for a newspaper?

A. No, sir; not after I read the receipt, I didn't.

Q. And that receipt was given you at the time you gave him the check?

A. Yes, sir.

Q. All there as a part of the same transaction?

A. That is right.

Q. And even though it was folded, unfolding it just took an instant of time, didn't it?

A. That is right, yes, sir" (R. 104).

At this point we emphasize the previously stated fact that when any person asked petitioner if he represented the Government, this being done occasionally, or indicated any confusion as to the character of the work

in which he was engaged, petitioner promptly and positively stated that he was not connected with the Government in any capacity but was soliciting funds for "advertising" (R. 167, 210, 230, 242, 257).

(c)

The Testimony of the Government Consists of Hasty Impressions and Unwarranted Conclusions That Bear No Reasonable Relation to the Things Said and Done by Defendant in Presenting His Plan and Therefore Do Not Present a Substantial Conflict with the Direct and Positive Evidence That Supports the Theory of the Defendant.

The proposition stated is clearly shown by an examination of the testimony of the Government witness, Anderson, first witness for the Government. Anderson did not testify to any transaction involved in the indictment, but to a similar transaction. He testified that he understood that petitioner was a representative of the Government although he could not state the exact language used to convey that impression (R. 30, 32, 33).

On the first trial, this witness had testified with emphasis that he did not see nor sign the check for $100 given to petitioner at the conclusion of his sales talk to Anderson, but that this check was written and signed by the bookkeeper in the store of the witness. It developed, however, that Anderson personally signed the check, and he acknowledged his signature when it was produced (R._____), but that is not the point here stressed.

On direct examination, Anderson testified that petitioner "represented himself * * * as a Government man," stated he had to "report to Washington every day or night" (R. 25), and further that the Government would make a contribution to supplement the funds contributed by the County (R. 27). No other witness testified to as many apparently incriminating declarations on the part of petitioner.

On cross-examination when pressed to particularize the things said and done by Pierce that caused the witness to conclude that he was an officer or representative of the Government, Anderson thus testified:

> "Q. Did he (Pierce) tell you he was an officer of the Federal Government?
>
> A. He was representing the Government to me.
>
> Q. Did he say he was an officer?
>
> A. *I wouldn't say he said he was an officer.*
>
> Q. Did you say he said he was representing the Government?
>
> A. I was being advertised in that paper—
>
> Q. I didn't ask you that. Did he say he was representing the Federal Government?
>
> A. He said enough to me to make me believe that he was there for the Federal Government.
>
> * * * * * * *
>
> Q. As a matter of fact, this thing was much fresher in your testimony in the first trial—in your testimony in the first trial, and you couldn't say and wouldn't say that he said he represented the Government: That was your testimony in the first trial?
>
> A. I am saying now that I wouldn't say how he brought that up" (R. 32-33)

Upon a fragmentary view of the testimony of Anderson, his conclusions and the statements attributed by him to petitioner, tend to support the theory of the Government that the latter was acting in the pretended capacity of a federal official. But when considered as a whole, and in connection with undisputed documentary evidence, the testimony of Anderson not only fails to support the theory of the Government but strongly corroborates the contention of petitioner that he was soliciting funds for community advertising and that the things said and done by him in the presentation of his plan left no room for any other conclusion.

Indisputable facts, shown by Anderson's testimony, considered as a whole, establishing to a mathematical certainty the proposition that his conclusion that petitioner represented the Government (R. 32-33) was solely the fault of the witness and not designed by nor disclosed to, petitioner, include the following:

(1) Petitioner identified himself as editor and publisher of the Huntsville Daily Register, discussed the work of that paper, requested the witness to furnish him pictures for publication therein, and exhibited copies thereof in a demonstration of the plan (R. 25, 27, 35).

(2) Petitioner read to the witness in part the letter of identification, Government Exhibit 2, and particularly the portions thereof which said "this will introduce J. E. Pierce, *editor and Vice-President of the Huntsville Daily Register*" and "we have assigned Mr. Pierce to the task of completing the Muscle Shoals series of *page newspaper advertisement*" (R. 35).

(3) Petitioner exhibited to Anderson several checks from contributors with whom the witness was acquainted, (all checks showed they were for advertising), and the witness testified that he could have seen what was written on these checks but only read the signatures (R. 34).

(4) Anderson's contribution for $100, the largest amount involved in any transaction with a Government witness, was paid by check. This check was not written by petitioner but by Anderson's bookkeeper. It showed on its face that it was given for advertising, and the check, including the words "for advertising" written plainly and in "bold, large letters," "very easy to see," was signed personally by Anderson (R. 28, 29).

(5) The receipt given by petitioner to Anderson's bookkeeper, in his presence, was not folded but open (R. 37).

Petitioner's then plainly stated purpose, a statement made in the presence and hearing of Anderson, for which the check was received appears from the testimony of Anderson's bookkeeper, J. A. Hill, who testified in behalf of the Government, and we quote therefrom as follows:

> "Mr. Pierce was seated at Mr. Anderson's desk when he instructed me to write the check, and so was Roach. I asked Mr. Pierce who to make the check to and he told me, in the presence of Mr. Anderson, to make it payable to the Huntsville Daily Register or bearer. And I asked him what it was for in the presence of Mr. Anderson and he told me it was for 'advertising,' and I wrote that on the check myself. There was no concealment from Mr. Anderson. Mr. Pierce did not whisper his instructions. He was four, five or six feet behind me, and there was nothing to keep Mr. Anderson from hearing him. After I had given him the check, Mr. Pierce gave me a receipt, handing it to me there in the office."

In determining petitioner's freedom from responsibility for Anderson's misunderstanding, it is immaterial whether Anderson heard the instructions or read the check or the receipt. Petitioner had no reason to believe Anderson would not read the check nor hear instructions given in his presence in a small private office to his bookkeeper who was instructed to write the check.

In the belief that Anderson's testimony more strongly supports the theory of the Government than that of any other witness, we selected it for special discussion. Of course, it would be impractical to make a detailed analysis of the testimony of each witness but the testimony of no Government witness presents a stronger case than that of Anderson. His testimony, when considered as a whole or in the light of indisputable documentary evidence, is destitute of any factual basis to support his conclusion that petitioner impersonated an officer or employee of the Federal Government.

The testimony of petitioner's witness Bringle is illuminating as to this confusion of concepts or identification of the means with the end and its probable consequence as reflected in the evidence. We quote therefrom as follows:

> "Mr. Pierce asked me then if I wasn't an advocate of cheaper power, good roads and TVA or something to that effect, and I told him I was.
>
> Q. In that connection did you make any inquiry as to what capacity he was there in?
>
> A. Him and myself discussed different things as to him, and sometime in this conversation I asked him if he was connected with the Government, and he turned and told me: 'Don't get me wrong, Judge, I don't represent the Government in any capacity.'
>
> * * * * * * *
>
> Q. You say something was said about cheaper power or TVA. Do you remember the exact language on that point?
>
> A. No, sir, I do not, Mr. Gwinn, because if he said cheaper power, I naturally connected with TVA, and if he had said TVA I would have connected it up with cheaper power" (R. 210).

Further illustrating the conclusions, sometimes absurd, to which a prior concept, a faulty recollection, or careless listening may lead, reference is made to the testimony of the Government witness Luckey that petitioner claimed to have been acquainted with Andrew Johnson (R. 112), the basis thereof being petitioner's statement that Oscar Johnson, one of the nation's leading agriculturists, had subscribed to his program of community advertising (R. 135).

Petitioner became acquainted with President Roosevelt when the latter was Assistant Secretary of the Navy (R. 135, 139). In praising the power objectives of the Roosevelt Administration, petitioner sometimes referred to this acquaintance (R. 240). Petitioner's letter of identification was signed by his son as president of the cor-

poration that published the Huntsville Daily Register (R. 36). Two of the Government witnesses (Anderson and Shoaf) neither, however, testifying to a transaction involved in the indictment, to whom this letter was read, stated that they thought it was signed by the President of the United States (R. 35, 131). The parts of the letter which these witnesses identified as having been read to them clearly show that there was no ground for such a conclusion (R. 35, 139).

According to one of the Government witnesses, when demand was made that petitioner refund the money paid him by another Government witness, he refused on the ground that he had sent the money to "Washington" (R. 61). But the witness making the demand testified that petitioner refused on the ground that he had sent the money to "Alabama" (R. 65).

These two government witnesses were testifying about the same conversation.

There were frequent references to the "TVA" in copies of the Huntsville Daily Register, containing page advertisements of counties previously canvassed, which were exhibited to the prospect in demonstrating the plan. In one of these papers the banner headline related to the "TVA" and from seeing this, which he referred to as the "big printed top" one of the indictment witnesses, Frank Blackman, formed the conclusion that petitioner was engaged in a Government enterprise (R. 71).

A conclusion formed upon such a flimsy basis is not substantial evidence that petitioner claimed official connection with either the Government or the Tennessee Valley Authority.

At pages 317-327 of the record there is set out extracts from the testimony of the indictment witnesses as given on the former trial. An examination of that testimony, in the light of the testimony of these witnesses at the present trial, illustrates to a pronounced

degree the principle that testimony regarding oral statements, and especially where the exact language of the declarant is a material consideration, is inherently weak and dangerous (*Throckmorton* v. *Holt*, 180 U. S. 551; *American Bell Telephone et al.* v. *People's Telephone Co. et al.*, 22 Fed. 309).

The question presented by the material difference in the testimony at the present and the former trial, concerning oral statements made by petitioner, is not a mere matter of impeachment but goes to the probative value of this testimony. An analysis and comparison of present and former testimony of Government witnesses shows clearly that they were stating conclusions and impressions which, under the facts and circumstances of this case, do not reach the level of substantial evidence of a violation of Section 32 of the Criminal Code and particularly if officers and agents of the TVA are excluded from the scope of that statute.

No Government witness, testifying to a transaction involved in the indictment, whose testimony even by a strained construction thereof could be interpreted as evidence that petitioner represented himself to be an officer or agent of the federal government, claimed to be able to state the exact language used by petitioner or to have observed with care the things done by petitioner in presenting his plan. In holding that such testimony, which did not represent the tenor of petitioner's utterance as a whole but mere fragments of it, was sufficient to overcome positive opposing testimony and otherwise unimpeached documentary evidence, the Court of Appeals disregarded the federal rule with respect to the quantum of evidence necessary to support a verdict as pronounced by this Court in *Gunning* v. *Cooley*, 281 U. S. 90, 50 S. Ct. 231, 74 L. Ed. 720.

The Government testimony, relating to transactions in the indictment, consists largely of impressions and con-

clusions, which, when considered in connection with all the facts and circumstances, are as consistent with a misunderstanding on the part of the witnesses as with a misrepresentation by petitioner, and therefore the Court of Appeals in affirming the conviction disregarded the settled federal rule that peremptory instructions should be given where the evidence, viewed as a whole, is as consistent with innocence as with guilt. *Union Pacific Coal Co.* v. *U. S.*, 173 Fed. 737 (8 C. C. A.); *Nicola* v. *U. S.*, 72 F. 2d 780 (3 C. C. A.).

(2)

To divide the cost of a series of page advertisements into units, and to solicit funds for the payment therefor on the basis of such units, is a plan that could be submitted to a person of ordinary experience without insulting his intelligence. But to pretend to be selling "TVA units," as charged in the indictment, such units having neither actual nor potential existence, and to make that claim to substantial farmers, merchants and physicians, would be a procedure that is difficult to explain on any theory consistent with common sense on the part of the claimant or ordinary intelligence on the part of the person to whom it was made. Consequently, if such a claim was made to persons of the classes mentioned, we think it would fall within the operation of the rule that there is no false pretense where the representation if "absurd or irrational or where the party alleged to be defrauded had the means of detection at hand." Wharton on Criminal Law, 12th Edition, Section 1456, pages 1742, 1743.

Here the persons alleged to have been defrauded not only had the "means of detection at hand" but actually had such means in hand, this being a plain and unambiguous receipt given each subscriber by petitioner, and every person thus furnished a receipt which he could then and there read was fully capable of understanding its meaning.

II.

THE REFUSAL OF PETITIONER'S SPECIAL REQUEST, A CORRECT STATEMENT OF THE LAW, STRICTLY APPLICABLE TO MATERIAL FACTS, AND NOT INCLUDED IN THE COURT'S GENERAL CHARGE, WAS A DENIAL OF DUE PROCESS OF LAW.

The refused special request is as follows:

"At the request of the defendant, the Court further instructs the Jury that the Tennessee Valley Authority, commonly designated as T. V. A., although an instrumentality of the Federal Government, is a corporate entity, separate and distinct from the Federal Government itself, and the officers and employees of that corporation are not within the scope of the statute on which the indictment in this case is based. Consequently, any claim or representation by the defendant, if you find that such claim or representation was made, that he was representing the T. V. A., or was connected with the T. V. A. as an officer or employee, would not constitute the false impersonation of an officer or employee of the United States Government or any department thereof, within the meaning of the Statute which the defendant is alleged to have violated in the several counts of the indictment" (R. 308).

Under the heading "Government Testimony" (*ante*, p. 10), we have stated the substance thereof as it related to each count on which a conviction was had.

An examination of that testimony as it relates to the point presented in the special request shows that the conviction under nine counts is not supported by a scintilla of evidence unless a claim of connection with, or representation of, the TVA constitutes the offense denounced by Section 32 of the Criminal Code (U. S. C., Tit. 18, Sec. 76).

Such an examination also shows that the three government witnesses, testifying to transactions involved in the other six counts on which petitioner was convicted,

so identified the TVA with the Government as to make the special request equally applicable to these counts.

It was the theory of the prosecution during the three trials of the case that the Tennessee Valley Authority or the TVA was an arm of the Government and that any claim or pretense of being an officer or employee of the TVA was a violation of Section 32 of the Criminal Code which prohibits the false impersonation of officers or employees of the Government or any of its departments (R. 316).

It was the theory of the petitioner that the Tennessee Valley Authority Act of 1933 (U. S. C., Tit. 16, Ch. 12 a, Sec. 831) created a corporate entity separate and distinct from the Government and that officers and employees of that corporation did not come within the purview of Section 32 of the Criminal Code.

Prior to and at the first trial of the case, this contention was presented in a motion to quash the indictment, in demurrer thereto, and also in the motion for a directed verdict. With respect to that contention, the Circuit Court of Appeals, which reversed the conviction on other grounds, said:

> "Another contention is that the Tennessee Valley Authority Act of 1933 creates a corporation that is an entity, separate and distinct from the Federal Government, and that its employees are not officers or agents of the United States within the purview of Section 32. *United States* v. *Strang*, 254 U. S. 29, and *United States* v. *McCarl*, 275 U. S. 1. The holding in the above cases is that the Emergency Fleet Corporation was not a department of the Government. The authorities are, however, inapplicable. The allegations of the indictment are broader than the contention implies, and to the allegations the proofs respond. The defendants were not charged with representing themselves as agents or employees of the Tennessee Valley Authority. They are charged with

having assumed or pretended to be representatives of the Government" (86 F. 2d, p. 951).

At the trial here under review, all the incriminating evidence, if it may properly be so designated, under nine counts was restricted to petitioner's purported claims of a connection with, or representation of, the TVA and a material portion of the government testimony under the other six counts related to such claimed representation of the TVA. But the charge nowhere drew any line or stated any distinction between an impersonation of officers or employees of the Federal Government or those of the TVA (R. 294-308).

In the situation thus stated, the refusal of the special request licensed the jury as to all counts to convict petitioner for a false impersonation of officers or employees of the TVA—an offense not charged in the indictment and this was a sheer denial of due process of law. *Thornhill* v. *Alabama*, 310 U. S. 88.

But that is not all.

Section 32 of the Criminal Code (U. S. C., Tit. 18, Sec. 76) at the time of the commission of the offenses herein alleged did not prohibit the impersonation of officers or employees of the Tennessee Valley Authority. This, in substance, was held by the court on the first appeal in this case, and on the second appeal, in the opinion affirming the judgment, the court stated that a claim to be "acting under the authority of the United States Government" was "*quite a different thing*" from claiming to be an "officer or employee of the Tennessee Valley Authority" (115 F. 2d, p. 401).

As we view it, the construction of Section 32 of the Criminal Code (U. S. C., Tit. 18, Sec. 76) by the Circuit Court of Appeals, excluding officers and employees of the TVA from the scope of that statute, is not an open question on this review. If so, a consideration of its plain

terms and of the report (No. 1763) of the Judiciary Committee of the House of Representatives with respect to the 1938 amendment to that statute compels the conclusion that prior to such amendment the statute did not extend to officers and agents of Government-owned or Government-controlled corporations.

The letter of the Attorney General, incorporated in the report of the Judiciary Committee, is as follows:

"Office of the Attorney General
Washington, D. C., May 7, 1937.

Hon. William B. Bankhead,
The Speaker, House of Representatives,
Washington, D. C.

My Dear Mr. Speaker: The existing law makes it a crime to impersonate any officer or employee of the United States with intent to defraud (Criminal Code, Sec. 32, U. S. Code, Title 18, Sec. 76). It seems desirable to extend the scope of the act so as to penalize impersonation of officers and employees of Government-owned and Government-controlled corporations.

The maximum penalty that may now be imposed for the offense of impersonation is imprisonment for a term of 3 years and a fine of $1,000. In aggravated cases a greater punishment may prove suitable, and I suggest increasing the maximum penalty to imprisonment for 5 years and a fine of $5,000.

A bill to effectuate this purpose is submitted herewith.

Sincerely yours,
Joseph B. Keenan,
Acting Attorney General."

The bill (Sec. 2381) as it passed the Senate contained both proposals of the Attorney General, but upon recommendation of the House Judiciary Committee the penalties of existing law were restored. This recommendation was as follows:

"Your committee concurs in the recommendation of the Attorney General with regard to extension of the statute, but is of the opinion that the existing penalties are sufficient. The committee amendment, therefore, restores the penalties in the bill to those of present law."

The Tennessee Valley Authority Act of 1933 created a *corporation* owned and controlled by the Government (U. S. C., Tit. 16, Ch. 12a, Sec 831) and since the amendment thereof by the Act of February 28, 1939, Section 32 of the Criminal Code extends to the impersonation of officers and employees of a Government-owned or Government-controlled corporation.

But the transactions involved in this case were charged to have been committed in 1935, and *ex post facto* legislation concerning such transactions should not be given a retroactive effect by *de facto* judicial evasion of the then existing law.

The refusal of the special request here under consideration is such an evasion with such a result.

In so insisting we state, first, that the general charge nowhere drew any line nor stated any distinction between an impersonation of officers and employees of the Government and those of the Tennessee Valley Authority; second, that in view of the mass of evidence relating to the Tennessee Valley Authority, such an instruction was imperative, and, third, the refused special request was a correct statement of the applicable law.

SPECIAL REQUEST NOT INCLUDED IN GENERAL CHARGE.

(1)

A Comparison of the Special Request (R. 308) with the General Charge (R. 294-307) Shows That the Points Presented in the Special Request Are Not Included in the General Charge.

As we construe the opinion of the Circuit Court of Appeals, it does not disagree with petitioner's contention,

made in that Court, that the general charge will be "examined in vain for the semblance of a suggestion that officers or employees of the Tennessee Valley Authority were *not* within the purview of the statute" (115 F. 2d 400), but the basis of its refusal to reverse the case for failure to give the special request was the conclusion of that court that such refusal did not mislead the jury or influence the outcome of the trial (115 F. 2d 401).

Regardless, however, of the accuracy of our interpretation of the opinion of the Circuit Court of Appeals, it is clear of doubt that the trial judge at no time during the trial stated or suggested any difference between the TVA and a department of the Government, and the charge neither expressly nor by implication told the jury that officers and employees of the Tennessee Valley Authority *were not* officers or employees of the Federal Government or any department thereof.

True it is that the jury was instructed that the false impersonation of officers or employees, acting under the authority of the Federal Government, or some department thereof, was the gist of the offenses for which defendant was being tried. But was the Tennessee Valley Authority a Department of the Government? The charge does not answer that question.

At the time of the commission of the alleged offenses for which defendant was tried were officers and employees of the Tennessee Valley Authority within the purview of Section 32 of the Criminal Code? The charge made no reference to that question.

At pages 13 and 14 of the Government brief, opposing the petition for certiorari, it was insisted that the instruction at page 306 of the record that a "reference to the TVA in copies of the Huntsville Daily Register" or in the sales talks made by petitioner should not be considered (by the jury) as evidence of a false claim or pretense of federal authority unless made with the "in-

tent of producing a belief on the part of the persons from whom funds were solicited that he, the defendant, Pierce, was acting as an officer or employee of the federal government," was the equivalent of the refused special request. Such a position is wholly untenable.

Anticipating a repetition of this contention, we here set out that portion of the charge that was the basis of the Government's contention:

> "At the request of the defendant, the Court charges you that the claim, if such was made, by the defendant Pierce, that the work in which he was engaged, or the program he was conducting, would hasten the development, or extension, of Cheaper Power in the counties canvassed by him; or, that the funds obtained by him would be used to aid the counties, or par[illegible] obtaining cheaper power, would not, of itself, constitute a false claim of Federal Authority under the statute for the violation of which the defendant is being tried, even though you should find that such claim may not have been well founded. Nor, would a statement, by the defendant Pierce, if such was made by him, that he was working in the interest of the Government, or the TVA, of itself constitute a false pretence of being an officer or employee of the Federal Government, or some department thereof, as the statute does not preclude a citizen's aiding in the furtherance of a Government program.
>
> "At the further request of the defendant the court charges the jury that the claim or assertion of the person that he is working in the interest of the Government, or in furtherance of a Government program, is not, of itself, a false claim or assumption of Federal Authority.
>
> "In this connection the Court further instructs the jury that reference to the TVA in copies of the Huntsville Daily Register, exhibited by the defendant to any person, from whom funds were solicited, and in the sales talks made by him, to such person, should not be considered by you as evidence of a

false claim or pretense of Federal Authority on the part of the defendant Pierce unless you further find and are satisfied from the proof, beyond a reasonable doubt, that such reference to TVA, in either the newspapers or sales talks, were made by the defendant with the intent of producing a belief on the part of the person from whom funds were solicited that he, the defendant Pierce, was acting as an officer or employee of the Federal Government" (R. 305, 306).

The special request dealt with a question of substantive law. The instruction above set out dealt exclusively with a question of "evidence," to-wit, the effect of certain references to the "Government, or the TVA," and it stated no distinction whatever between references to the Government and the TVA. Standing alone, the reference to the "Government, or the TVA," these being referred to in the alternative, might be construed as putting them on the same basis with respect to the operation of Section 32 of the Criminal Code, but when the instruction is considered as a whole it is obvious that it was not intended to instruct the jury as to the status of the Tennessee Valley Authority, that is, whether it was a department of the Government or a separate corporate entity.

Regardless of the status of the Tennessee Valley Authority, if petitioner, by references to the TVA, intended to produce a belief on the part of the persons from whom funds were solicited that he was acting in a federal official capacity, then such references were proper to be considered in determining his guilt or innocence, but unless intended to produce such a belief neither a reference to the Government nor to the TVA should be considered as a circumstance of guilt. Clearly this is the meaning of that part of the charge above set forth.

But that is something materially different from the point presented by the special request.

If, however, the language of the general charge may by a technical interpretation be read so as to cover and include the proposition contained in the special request, it cannot fairly and reasonably be held to present "distinctly and sharply to the jury" the ground of defense set forth in that request. Therefore, the refusal of the special request constitutes reversible error. *McDonald* v. *U. S.*, 241 Fed. 793, 799.

The reason why an obscure meaning in a general charge, or one that may be deduced from a careful examination of the printed page, does not excuse the refusal of a special request which clearly and sharply brings a material point to the attention of the jury, is well stated by the Circuit Court of Appeals for the 8th Circuit in *Western Union Tel. Co.* v. *Morris*, 105 Fed. 49, 53 (C. C. A. 8), as follows:

> "In support of the rulings of the court counsel for the defendant in error invoke the rule that it is not erroneous for the trial court to refuse to give instructions to the jury in the language of the attorneys when the substance of the instructions is embodied in the general charge of the court. The soundness of this rule is conceded, but its applicability to this case is not admitted. It may be that the substance of some of the requests can be deducted from the general charge of the court by a careful and painstaking process of reasoning * * * But this conclusion is a deduction from a careful study of the written charge and an extended process of reasoning. The jury had no opportunity to study this charge in this way. They did not read it at all, and heard it but once. It is plain that it did not as clearly present to those who heard it the real issues as did the requests for instructions which formulated them. A single delivery or reading of this general charge probably would not at once present to the minds of all who heard it the crucial questions in this case, which the submission of the instructions requested which clearly stated those issues and applied the law to them would have been sure to do so * * *."

REQUESTED INSTRUCTION APPLICABLE TO EVIDENCE.

(2)

In View of the Mass of Evidence Relating to the Tennessee Valley Authority, So Vital a Point As the Distinction Between That Corporation and a Department of the Government Should Have Been Covered by a Clear and Explicit Instruction.

Bird v. *United States*, 180 U. S. 356, 45 L. Ed. 570.
Little v. *U. S.*, 73 F. 2d 861 (C. C. A. 10).
U. S. v. *Messinger*, 68 F. 2d 234 (C. C. A. 4).
Bates County v. *Wills*, 239 Fed. 785 (C. C. A. 8).
Northern Central Coal Co. v. *Hughes*, 224 Fed. 57 (C. C. A. 8).

No line being drawn by the general charge between the impersonation of officers of the Government and those of the T. V. A., the jurors, if they believed that petitioner claimed to represent the T. V. A., would have returned a verdict of guilty under any count where such a representation was made although there was no evidence that petitioner also claimed to represent the Government. This is not a matter of speculation, as that is precisely what was done by the jury, which returned a verdict of guilty under all counts of the indictment, including those where the government witness did not claim that defendant made any reference whatever to the Federal Government.

The Court of Appeals did not hold that the general charge drew any line between impersonation of officers or employees of the Government and those of the Tennessee Valley Authority, nor hold that the special request did not correctly state the law on the point therein stat but held in effect that its refusal was harmless error (11[illegible] F. 2d 401).

Such a conclusion was a jury-invading speculation. How could that court determine what verdict would have been rendered under proper instructions without in-

vading the province of the jury which is the "fact finding body in criminal cases"? (*Patton* v. *U. S.*, 281 U. S. 276.)

Upon what theory consistent with the principle stated could the Court of Appeals hold that the verdict would not have been affected by an explicit instruction as to the effect and the limitations of the evidence relating to statements claimed to have been made by petitioner that he represented or was connected with the T. V. A.?

And upon what theory other than the failure of the jury to make any distinction between an impersonation of officers or employees of the Tennessee Valley Authority and those of the Government can the verdict on the transaction with Conyers (Counts XVI and XVII) be explained when there is not a whisper of evidence that petitioner in such transaction claimed any representation of or connection with any official agency except the T. V. A.? (R. 120).

Here is what Conyers testified:

> "He (Pierce) said, I am representing TVA in their project to get to the rural communities in the TVA territory. He said that the TVA has a proposition in which they propose to meet the counties in a subscription of something that he called units. He said each county, according to its area and population is asked to do so much, and the TVA, we are meeting that with TVA funds" (R. 120).

One of the chief objectives of a charge is to "bring into view the relation of the particular evidence adduced to the particular issue involved." *Bird* v. *U. S.*, 180 U. S. 356, 362.

Obviously the general charge did not do this with respect to the testimony of Conyers, and the refusal of the special request was therefore a violation of the principle pronounced by this Court in *Bird* v. *U. S.*, *supra*.

To speculate as to the consequence of that violation is to deny petitioner that fair trial before a properly instructed jury that is contemplated by our statutes and constitutional provisions. *Little* v. *U. S.*, 73 F. 2d 861, 866, 867; *Broadway Mfg Co.* v. *Leavenworth Terminal Ry. Bridge Co.* 81 Kan. 616, 106 Pac. 1034, 28 L. R. A. (N. S.) 156.

What has been said with respect to the application of the principles stated in *Bird* v. *U. S.*, *supra*, and *Little* v. *U. S.*, to the foregoing testimony of Conyers is equally applicable to the testimony of the other indictment witnesses, that is, those testifying directly to transactions involved in the indictment.

Government witnesses, testifying to transactions involved in the indictment, did not claim to be able to repeat the exact language used by petitioner with respect to the Government (R. 51, 69, 70, 77, 78, 86, 97, 110, 112, 123).

The basis of the conclusion of these witnesses that petitioner was representing the Government was their construction of statements relating to the T. V. A. and cheaper power which they regarded as government enterprises, and in their testimony they made no distinction between the Government and the T. V. A.

Instances include:

The testimony of Simpson, relating to counts 11 and 12, that petitioner claimed to be "working in the interest of the Government" (R. 73, 78). This witness testified at a preliminary hearing when the matter was fresh in his recollection that petitioner claimed to be "working in the interest of T. V. A." (R. 78, 79, 288); that of Blackman, testifying to the transaction in Counts 14 and 15, that he reached the conclusion that petitioner represented the Government because the letters "TVA" constituted the

"big printed top" across the page of one of the newspapers exhibited to the witness (R. 71); that of Robinson, testifying in regard to Counts 18 and 19, that he quoted petitioner as saying that he represented the Government because the latter claimed to be "selling T. V. A." which the witness considered a "government project" (R. 316, 317).

To detail further testimony, showing that Government witnesses who reached the conclusion that petitioner represented the Government made no distinction between the T. V. A. and the Government, and held the conception that the T. V. A. and the Government were identical or that the former was a department of the latter, would serve no useful purpose. It is too clear to admit of reasonable controversy that the conclusion of each of the indictment witnesses, not one of whom claimed to be able to state the exact language used by petitioner, rested largely, if not entirely, upon the belief of the witness that a representative of the Tennessee Valley Authority was a representative of the Government (R. 52, 55, 56, 66, 71, 78, 79, 84, 91, 316, 317).

Consequently, the jurors in the absence of an instruction to the contrary could infer, and were likely to infer, that the T. V. A. was a part of the Government and that no distinction need be made between an impersonation of Government officials and the impersonation of T. V. A. employees in determining the guilt or innocence of the defendant. But that distinction was of major importance in nine counts and a material consideration in the others. This being true, the refusal of the special request was error as to all counts. *Lomento* v. *United States*, 4 F. 2d 900 (C. C. A. 8).

REFUSAL OF SPECIAL REQUEST PLAIN ERROR.

(3)

Petitioner's Special Request Was a Correct Statement of the Law. It Related to a Material Matter That Was Not Included in the Court's General Charge. Its Refusal Was Therefore Plain Error.

Thorwegan v. *King*, 111 U. S. 549, 28 L. Ed. 515.

The error in its refusal was not cured by correct instructions on points not covered by the request nor by a clear and explicit instruction that before a conviction could be had the evidence must show beyond a reasonable doubt that petitioner falsely impersonated an officer or employee of the United States Government. Had that instruction related to the matter presented by the special request, petitioner on request would have been entitled to have the converse thereof submitted to the jury. *Bird* v. *U. S.*, *supra*; *Little* v. *U. S.*, 73 F. 2d 861, 867.

But the instruction that the Government was required to prove beyond a reasonable doubt that petitioner falsely claimed or pretended to be an officer or employee of the United States did not reach the defense set out in the special request.

Such an instruction did not suggest nor define the status of the TVA but left the jury free to infer that the Tennessee Valley Authority was a part of the Government and its officers and agents within the purview of Section 32 of the Criminal Code. If there is a hint or an intimation to the contrary in that instruction or the general charge, where is it, and what is it?

At the time of the commission of the offense alleged herein, officers and agents of the TVA were excluded from the operation of Section 32 of the Criminal Code. If that was the law, and it was, why should not the jury have been so told in plain terms?

In the absence of such an instruction, it can not be told whether the verdict was based on evidence of an impersonation of officers or employees of the TVA—not of itself a federal offense—or upon evidence of an impersonation of officers or employees of the United States Government. This being true, the verdict can not be sustained. *Stromberg* v. *California*, 283 U. S. 359, 75 L. Ed. 1117.

It is not necessary that petitioner in order to obtain a reversal for failure to give the special request explore the minds of the jurors and show that they actually entertained the conception that the TVA was a department of the Government. This he could not do, and if "*within the range of a reasonable possibility*" the refusal of petitioner's special request, stating the law that was applicable to a material part of the evidence, may have "affected the verdict" of the jury, the error in its refusal can not be disregarded as harmless without an invasion of the province of the jury by the reviewing Court. *Little* v. *United States*, 73 F. 2d (C. C. A. 10) 861; *Broadway Mfg. Co.* v. *Leavenworth Terminal Ry. & Bridge Co.*, 81 Kan. 616, 106 Pac. 1034, 28 L. R. A. (N. S.) 156.

Anticipating a renewal of the criticism of the special request, made at page 14 of the Government brief, opposing the petition for certiorari, we shall briefly consider that criticism.

It was there insisted that the special request should have included the qualification that any reference by petitioner to the TVA, if intended to convey the impression that he was an officer of the Government, would constitute a violation of the statute. But in the general charge, the Court had so instructed the jury (R. 306), and there was no reason why he should be asked to repeat in the special request an instruction on a point covered by the general charge when the request related to a matter omitted from the charge.

At any rate the special request challenged the attention of the Court to the ground of defense therein set

forth, and petitioner's right to a clear instruction on the matter thus presented was so important that a reviewing court should disregard technical defects, if any, in that request. *McDonald* v. *U. S.*, 241 Fed. 793-799.

It is not believed that there was any material defect in the special request under consideration, but in view of the mass of evidence relating to the TVA and the probability that the jury might conclude that the TVA was a "branch of the United States Government" or an "authority of the United States," the Court in accordance with well established principles, and in the absence of any special request, should have instructed the jury on the effect of such evidence.

Authorities holding that in criminal cases the Court should instruct on all essential questions of law involved whether requested or not, include:

Calton v. *People*, 103 U. S. 83, 32 L. Ed. 870.
Bird v. *U. S.*, 180 U. S. 356, 45 L. Ed. 570.
Kinard v. *U. S.*, (D. C. App.) 96 F. 2d 522.
Meadows v. *U. S.*, 82 F. 2d 88 (D. C. App.).
Kriemer v. *U. S.*, 11 F. 2d 722 (C. C. A. 2).
Strader v. *U. S.*, 72 F. 2d 589 (10 C. C. A.).
Lamento v. *U. S.*, 4 F. 2d 901 (C. C. A. 3).
Pearson v. *State*, 143 Tenn. 385, 397, 226 S. W. 588.
Boyett v. *U. S.*, 47 F. 2d 482 (C. C. A. 5)
Oras v. *U. S.*, 67 F. 2d 463 (C. C. A. 9).
Commonwealth v. *Jordon*, 328 Pa. 439, 196 Atl., p. 10.

The reason for the rule is well stated in *Pearson* v. *State*, *supra*, a Tennessee decision cited with approval in *Kriemer* v. *U. S.*, and *Kinard* v. *U. S.*, *supra*, in which the Court says:

> "The Court's charge is the safeguard of one accused and is his guarantee that his trial will be protected by all the rules of law established in expe-

rienced judicial procedure for securing a fair and impartial trial."

There is no substantial evidence, as petitioner construes the record, that officers or agents of the Tennessee Valley Authority were impersonated by him, but if so, Section 32 of the Criminal Code, as it existed in 1935, could not be extended by judicial construction to include such an impersonation without violating principles that are fundamental in our system of jurisprudence.

There are no common law crimes punishable by the Federal Government, and before punishment can be imposed by Federal Courts, the act charged and proven must be clearly and unmistakably within the provisions of a Federal penal statute. These may not be enlarged by construction to include kindred acts which the courts may consider as reprehensible as those denounced by the statute. *Falulo* v. *United States*, 272 U. S. 620, 71 L. Ed. 443.

Without further discussion of the special request it is respectfully insisted that in view of the extent to which the testimony related to a claimed connection, on the part of petitioner, with the TVA or his discussion of the objectives thereof with the witnesses, the refusal of that request licensed the jury to convict on a charge not contained in the indictment, as construed by the Circuit Court of Appeals, and also to convict for words and acts that were only made offenses by an *ex post facto* statute. To license the jury to do either constitutes a denial of due process of law.

III.

A MERE DECLARATION OF A GENERAL OR UNDEFINED FEDERAL AGENCY OR EMPLOYMENT UNACCOMPANIED BY ANY APPARENT OR COLORABLE OFFICIAL ACT DOES NOT CONSTITUTE THE FALSE PERSONATION THAT IS AN ESSENTIAL ELEMENT OF BOTH OFFENSES DENOUNCED BY SECTION 32 OF THE FEDERAL CRIMINAL CODE.

In making the foregoing contention, we do not insist that the statute restricts either offense to the impersona-

tion of a particular official or the performance of legally authorized acts. The statute may be violated although the assumed office or authority has no legal existence. But the statute requires something more than words to constitute a false impersonation. It does this in express terms:

> "Whoever, with intent to defraud * * *, shall falsely assume or pretend to be an officer or employee acting under the authority of the United States * * *, and shall take upon himself to act as such, or shall in such pretended character demand or obtain any money, etc., * * * shall be fined or imprisoned * * *, and shall take upon himself to act as such, or shall in such pretended character demand or obtain any money, etc., * * * shall be fined or imprisoned" * * *.

False personation is the "gist" of both offenses punishable under this statute. *Little* v. *United States*, (9 C. C. A.) 169 Fed. 620, *Ferguson* v. *United States*, (10 C. C. A.) 293 Fed. 361; *Read* v. *United States*, (2 C. C. A.) 252 Fed. 21. The prohibition of the first clause of the act is carried forward into the second by the use of the words "in such pretended character." *Lamar* v. *United States*, 241 U. S. 103.

In *King* v. *United States*, (5 C. C. A.) 279 Fed. 103, the Court thus construed an indictment which charged that the accused "did then and there in such pretended character place the said (naming the parties) under arrest":

> "The word 'pretend' in the connection in which it is used in the indictment, means the putting forward of a false appearance of being officers * * * the simulating or feigning to be officers."

In *Cronin* v. *People*, 80 Mich. 646, cited with approval by the Supreme Court in *Barnow* v. *U. S.*, 239 U. S. 74, as to the construction of the clause, "And take upon himself to act," etc., the Michigan court, construing a

state statute almost identical with the Federal statute, said:

> "The statute does not attempt to punish any person for falsely assuming to be any of the officers named in the section, but for assuming and taking upon himself to act or officiate in any office or place of authority."

How could any person "take upon himself to act or officiate in any office or place of authority," unless he exhibited some badge or insignia of office or performed a colorable official act? This need not be a legally authorized act, but it must be an act done in the "falsely assumed character" (*Lamar* v. *United States, supra*) and an act in "keeping with the pretense." *United States* v. *Barnow, supra.*

In the instant case, petitioner exhibited no badges, executed no purported official receipts, did not have in his possession any "T. V. A. Stock" or "T. V. A. Units," or anything purporting to be such, or bearing any Government label or signature. All he did was obviously the act of a private citizen, not a Government official. Every check taken was payable to a privately owned and privately published newspaper, and its receipt was issued for all funds received by Pierce. If Petitioner verbally claimed to be a Federal official, the acts done were destructive of that pretense.

The precise point here involved was not before the court in Barnow case, but there is nothing in that decision in conflict with the construction of the statute for which we here contend. In that case, the accused was charged with selling a set of books, entitled "Messages and Papers of the Presidents," as a pretended agent of the United States, the purchaser believing that the Government would receive the money for the publication. It was held that this constituted a violation of the statute, although there was no person authorized to make such sales for the Government and the office, or place of au-

thority, in which the accused assumed to act or officiate, had no legal existence. But "Messages and Papers of the Presidents" was a set of books that had been published under the authority of the Congress (*Bush* v. *United States*, 196 Fed. 579). Its possession and sale under a claim of Federal authority was an apparent official act.

In the instant case, however, it is alleged that the defendants claimed to be "representatives of the Government T. V. A. Units." There was no such thing as "T. V. A. Units," and claiming to sell something, if such a claim was made, that had neither legal nor actual existence, and was neither shown nor described to the purchaser, nor in the evidence, presents a radically different situation from the act of selling "Messages and Papers of the Presidents"—apparently a Government publication. One is a mere verbal declaration; the other a colorable official act.

Where there is no impersonation of a particular individual, known to be a Federal officer by the victim of the intended fraud, it is difficult to understand just how a non-existent Federal office or employment, or a general Federal agency, could be impersonated or assumed without displaying a badge or insignia of authority or performing an apparent official act. It is the pretended official act that brings the case within the operation of the statute.

CONCLUSION.

If a substantial proportion of the hundreds of persons to whom petitioner presented his plan had reached the conclusion that he was connected with, or represented, the Government, or the TVA, there might be some ground on which to hold that he intended to convey such an impression to the person from whom funds were solicited.

But when it is conclusively established that in a presentation of the plan so uniform that it could aptly be

designated as a "canned sales talk" the overwhelming majority of the persons to whom it was presented clearly understood that petitioner was acting in the capacity of a newspaper man, soliciting funds for community advertising, a conclusion to the contrary only being formed in exceptional cases and not then disclosed to petitioner, there is no basis on which to rest a finding that petitioner intended to deceive the prospects to whom his plan was presented.

Considered as a whole, the evidence herein is as consistent with a misunderstanding on the part of government witnesses as to the capacity in which petitioner acted as it is with a fraudulent misstatement by him of that capacity. This being true, the trial court, following the familiar rule that where all the substantial evidence is as consistent with innocence as with guilt, should have sustained the motion for a directed verdict. To hold otherwise is to do lip service to the substantial evidence rule but apply the scintilla rule rejected by this court in *Gunning* v. *Cooley*, 281 U. S. 90.

Furthermore, it cannot be determined on this record whether petitioner was convicted for a claimed representation of, or connection with, the T. V. A., not a federal offense at the time of the transactions involved in this case, or for an impersonation of officers or employees of the government. In that situation, the basis of the verdict being a matter of speculation, the conviction was a denial of due process of law. *Stromberg* v. *California*, 283 U. S. 359.

There is nothing criminal in referring to the Government, or in mentioning the TVA, or in "working in the interest of the Government," or in claiming that community "organization and advertising" would hasten the extension of cheaper power into rural communities. Doubtless, many persons, like the witness Garner who fully understood the plan, believed, that their contributions

would bring cheaper power into their communities "quicker" than it would otherwise come. And this belief may have been encouraged by defendant, but that was a thing separate and distinct from the impersonation of Federal Officials.

It is well settled that each count in the indictment is "regarded as if it were a separate indictment." *Dunn v. United States*, 284 U. S. 390. The sufficiency of the evidence to support a verdict under any count is not established by the "mouths of two or three witnesses" but rests upon the testimony of a single witness.

Human liberty is too priceless to depend upon the accuracy of the recollection of a single witness as to whether a defendant, four years before the witness testified, said he was "working in the interest of the Government," or was a "representative of the Government," or whether he said "TVA units," or simply used the word "units," as a basis for collecting subscriptions to a community advertisement.

Respectfully submitted,

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